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IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 356.

AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,

vs.

R. A. SPEED, CLERK, ETC.,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES T. CATES, Jr.,
Attorney General of Tennessee,
For Defendant in Error.

JAMES M. GREER,
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AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,
vs.
R. A. SPEED, CLERK, ETC.,
Defendant in Error,

Error to the Supreme Court of Tennessee.

May it please Your Honors:

The Supreme Court of Tennessee construing a statute of that State and applying it to the particular facts set out in the opinion of the court, adjudged that the plaintiff in error was liable for a "merchant's tax" upon the "average capital stock invested" in its business in Memphis, Tennessee, and, by writ of error, plaintiff in error seeks to have said judgment reviewed by this court.

The Statement of the Case

As made by plaintiff in error on its brief is correct to the extent of the quotations from the opinion of the Supreme Court of Tennessee, but because it *ignores many material facts* found by said court and which, in our opinion, are vital to the questions to be determined by this court, we respectfully call the attention of this court to the whole opinion of the Supreme Court of Tennessee in the

Record pp. 165-174.

Points Determined by the Supreme Court of Tennessee.

1. That plaintiff in error was engaged in business in Memphis, Tennessee, as a merchant dealing in staples, nails, wire, etc., within the sense and meaning of the statute defining and taxing merchants.

Record pp. 170-171.

2. That the goods belonging to plaintiff in error, stored in the warehouses in Memphis, and representing the "average capital invested" upon which the merchant's tax was assessed, were *not in transit* from one state to another as contended by plaintiff in error, but were assembled and at rest in said warehouses for the purpose of sale and to meet deliveries on sales made and to be made.

Record pp. 171-174.

3. That said goods were put up for sale in said warehouses in Memphis and were so dealt with by plaintiff in error as to make them part of the general mass of property in the State of Tennessee.

Record p. 174.

4. That the tax assessed against plaintiff in error as a merchant "dealing" in nails, wire, staples, etc., contained no element of discrimination against plaintiff in error as a foreign dealer, or otherwise.

Record p. 174.

5. That, upon the facts as found, the assessment of taxes against the plaintiff in error as a merchant was not in violation of Article 1, Section 8, sub-Section 3 of the Constitution of the United States which empowers Congress "to regulate commerce with foreign nations, and among the several states, and among the Indian tribes."

An examination of the assignment of errors and brief of plaintiff in error discloses that it seeks to have each and all of the questions decided by the Supreme Court of Tennessee, both of law and fact, reviewed by this court, but we respectfully submit that the judgment of the Supreme Court of Tennessee is final, conclusive and not reviewable by this court in respect of:

1. The questions of fact involved in said judgment.

Dower vs. Richards, 151 *U. S.*, 664.
In Re Buchanan, 158 *U. S.*, 36.

2. The interpretation, and application to the facts found, of the Constitution and Statutes of Tennessee as declared in said judgment.

Western Union Tel. Co. vs. Gottlieb, 190 *U. S.*, 425.
New York vs. Roberts, 171 *U. S.*, 661.

Therefore it follows that the judgment of the Supreme Court of Tennessee in respect to plaintiff in error being a dealer in nails, wire, staples, etc., in Memphis, Tennessee, and as such within the statute defining and taxing merchants, and that the tax in question was not discriminatory against plaintiff in error by reason of any provision of the constitution or statutes of Tennessee, or otherwise, is final and conclusive; but without in any way waiving our insistence that these questions are not open to inquiry in this court, we deem it proper, before adverting to the real and single inquiry presented on this record, to fully answer the plausible and ingenious argument advanced by the eminent counsel of plaintiff in error under the 1st and 4th assignments of error to the effect:

1. That plaintiff in error was not a merchant within the proper interpretation of the statute defining and taxing that business, and

2. That the tax in question was discriminatory against plaintiff in error as a foreign dealer in articles manufactured of the produce of other states by reason of the exemptions contained in the constitution and statutes of Tennessee in favor of articles manufactured from the produce of that State.

The holding of the Supreme Court of Tennessee on these questions adverse to the contention made on behalf of plaintiff in error was sound in law and abundantly supported by the facts, and treating the contentions of plaintiff in error in the order above stated, we respectfully submit:

FIRST.

That plaintiff in error was carrying on the business of a merchant, and as such properly assessed for taxes, within the sense and meaning of the Tennessee statute.

To avoid the force and effect of the construction placed by the Supreme Court of Tennessee upon the statute defining and taxing the business or occupation of a merchant the eminent counsel of plaintiff in error relies upon the definition of the term "merchant" as found in the opinion of the Supreme Court of Tennessee in the case of State vs. Smith (5th Hump., 394) decided in 1844, and insists that inasmuch as the Supreme Court of Tennessee, in the case just mentioned, placed an interpretation upon the term merchant different from the construction or meaning given that term in the pending suit, that this court may adopt either construction in accordance with its own opinion as to what should be decided or govern in this particular case. And to reinforce this contention it is further insisted on the brief of plaintiff in error that as late as 1883 the Supreme Court of Tennessee in Taylor vs. Vincent (12 Lea, 282) practically reaffirmed the definition of the term merchant as laid down in the *Smith* case, *supra*, wherein it was in effect held that a merchant or dealer is "one who buys to sell again."

It must be borne in mind however that in the *Smith* case the Supreme Court of Tennessee was considering a statute which used the term "merchant" without attempting to define it, and therefore recognized the definition which custom and usage had given to the word. In Taylor vs. Vincent, supra, the sole question decided by the court was that a manufacturer of liquors selling in unbroken packages *from his place of business* can not be taxed as

a dealer, and the quotation from the opinion of the court in that case as set out on the brief of plaintiff in error in respect to the definition of a dealer was pure *dicta* as is clearly shown in the opinion of the Supreme Court of Tennessee in Kurth vs. State (86 Tenn., 134-7) decided in 1887, where the court speaking through Mr. Justice Lurton said:

> "The case of Vincent vs. Taylor, 12 Lea, 282, is pressed upon us as determining that a dealer is one who buys to sell again. In this we do not concur. But this proposition is no part of the decision of the case, and was only used in argument by the judge in delivering the opinion of the court. The decision in that case only goes to the point of deciding that, under the revenue laws of 1881 and 1883, a manufacturer of liquors from the produce of this state, *who sold at his place of manufacture to dealers in unbroken packages*, was not a wholesale dealer within the meaning of those acts. *The Act of* 1885, *and the subsequent Act of* 1887, *define who are dealers within the meaning of these Acts, and this was doubtless done to meet the decision in the Taylor case.*"

And in the *Kurth* case it was distinctly and unequivocally held that even a manufacturer of liquors from the produce of the state, under the revenue statutes of 1885-1887 enlarging and making more comprehensive the definition of the term dealer or merchant, could not deal without paying the tax assessed against a dealer.

Thus it will be seen that the cases relied upon by plaintiff in error were decided under a statute which did not attempt to define the term merchant, but since these cases were decided, the General Assembly of Tennessee acting within its just authority has seen fit to declare that *all persons or corporations engaged in trade or dealing in any kind of goods, and whether the same be kept for sale or be purchased and offered for profit, are to be taxed as merchants.*

On his brief (p. 16) counsel for plaintiff in error refers to the Act of 1899, and while the Acts of 1899 and 1901, both of which

are involved, are substantially identical, we prefer to cite the Act of 1901, because this act is referred to in express terms in the opinion of the Supreme Court of Tennessee set out in the record.

The General Assembly of Tennessee (following the Acts of 1885, Ch. 1, Sec. 15 and of 1887, Ch. 2, Sec. 16, referred to by Mr. Justice Lurton, *supra*,) defined the term merchant as follows:

> "The term 'merchant' as used in this act includes all persons, co-partnerships, or corporations engaged in trading or *dealing* in any kind of goods, wares or merchandise, * * * *whether such goods, wares or merchandise be kept on hand for sale or the same be purchased and delivered for profit*, as ordered."
>
> *Acts of* 1901, *Ch.* 174, *Sec.* 27.

The Supreme Court found as a fact that plaintiff in error was "dealing" in nails, staples and wire in the City of Memphis at the time it was assessed for taxes and had been since February, 1900, and for a short time prior thereto, *and that said goods were not sold from their place of manufacture*, but were kept in stock at Memphis, and this stock drawn on from time to time to fill contracts of sale made by the company's salesmen, or to fill contracts made by means of the intending purchasers depositing specifications of goods desired, with the Patterson Transfer Company, and in that manner obtaining the goods. And further the court found that these goods were assembled in warehouses at Memphis and there exposed for sale, that deliveries were made therefrom to jobbers in Memphis as well as those residing in other states, and that the customers of plaintiff in error residing in Memphis could, when the goods desired by them were in stock, deposit their specification for the goods desired with the Patterson Transfer Co., and immediately on the same day obtain and have delivered to them the goods purchased.

Record pp. 170-173.

Upon these facts the Supreme Court of Tennessee held that plaintiff in error was a merchant within the sense and meaning of the aforesaid act of 1901, Ch. 174, Sec. 27.

Further it is not improper to call the attention of this court to the fact that after the assessment in question had been made against plaintiff in error by the County Court Clerk of Shelby County, the defendant in error here, the whole matter involving the status of plaintiff in error as a merchant and its liability to be assessed as such, was, on the appeal of plaintiff in error, laid before the State Board of Equalization where the assessment as made was in all respects affirmed, and by the express terms of the Acts of 1899 and 1901 it is provided: "The action of the State Board of Equalizers shall be final and conclusive as to all matters passed upon by the board and taxes shall be collected upon valuations so fixed and found by said board."

Record pp. 81-4.
Acts of 1901, *Ch.* 174, *Sec.* 38, *Sub-Sec.* 10.
Acts of 1899, *Ch.* 435, *Sec.* 39, *Sub-Sec.* 10.
Grundy County vs. Tenn. Coal Co., 94 *Tenn.*, 305.
Ward vs. Alsup, 100 *Tenn.*, 750.

SECOND.

The tax assessed against plaintiff in error as a merchant contains no element of discrimination against it as a foreign dealer, or otherwise.

The contention to the contrary made by the plaintiff in error under its fourth assignment (brief p. 42), is based upon its construction of Sec. 30, Article 2, of the Constitution of Tennessee, which provides that "no article manufactured of the produce of this state shall be taxed otherwise than to pay inspection fees," and what is referred to as an opinion delivered by Mr. Justice Wilkes in the case of Benedict vs. Davidson County, which however has never been officially reported and was not in fact filed for publication; but an examination of the opinion set out on pp. 43-48 of the brief discloses that the learned justice was dealing with the question of lumber in the hands of the manufacturer *at its place of business*, and that case is clearly distinguishable in its facts from the case at bar, as is made manifest by the exceptions stated on page 47 of the brief upon which it is expressly stated that no opinion is expressed with respect to the application of the constitutional

exemptions in question to the conditions noted in the exceptions, which were held not to be involved in that case.

The "merchant's tax" in Tennessee is *sui generis* and is strictly neither an *ad valorem* tax nor a privilege tax within the exact meaning of those terms, and while it partakes of the elements both of the *ad valorem* and privilege taxes, yet it is a tax laid "upon the average capital invested" in the business, and the General Assembly of Tennessee is given unrestricted power in the imposition of taxes on merchants, in that by Section 28 of Article 2 of the Constitution, it is provided that the "Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

In the case of Oliver Finney Grocery Co. vs. Speed, Clerk, (87 Fed. Rep. 408) Judge Hammond, presiding in the Circuit Court for the Western District of Tennessee and entirely familiar with the revenue laws of that State, in passing upon the revenue act of 1897 (which is in substance the same as the Acts of 1899-1901 under consideration,) said, that it is perhaps a misnomer to refer to this merchant's tax as an *ad valorem* or strict privilege tax, and that the confusion arises out of the peculiar process provided in the act for levying the merchant's tax, in that while it is called both an ad valorem and a privilege tax, it is really an arbitrary tax levied upon the business of the merchant without any discrimination as to the character of the business in which he is engaged as between domestic and foreign or interstate goods or transactions."

Oliver Finney Grocery Co. vs. Speed, Clerk, 87 *Fed. Rep.* 409-412.

That it is not a strict ad valorem tax is conclusively shown by the provision in the revenue acts relating to the assessment of personal property to the effect that *"all personal property which is a part of the capital invested in the business of a merchant * * * shall not be assessed separately as personalty,* but shall be assessed as part of the capital, as provided in Section 8 of said Acts relating to the assessment of taxes against merchants."

Acts of 1899, *Ch.* 435, *Sec.* 8, *Class* 9.
Acts of 1901, *Ch.* 174, *Sec.* 8, *Class* 9.

The revenue acts in question provide that the *"average capital invested"* in the business of merchant shall be ascertained by adding together the highest and lowest amounts of stock on hand at any time during the year, and dividing that sum by two, but if the average stock on hand is less than the capital stock employed by the merchant he shall be taxed on the capital stock usually invested in the business.

Act of 1901, *Ch.* 174, *Sec.* 27.

Section 30 of Article 2 of the Constitution of Tennessee has been before the Supreme Court of that State in a number of cases and it has been uniformly decided that the exemption therein provided applies only to the *manufactured article* in the hands of the manufacturer *at his place* of business, and that it does not exempt goods or articles manufactured of the produce of the state, in the hands of the merchant or dealer, from the merchant's tax.

In the case of State vs. Crawford, McNeil & Co., 2 Head, 461, the Supreme Court of Tennessee construing Sec. 30, of Article 2 of the Constitution in connection with the provision of the constitution above quoted that the "Legislature shall have the power to tax merchants, peddlers and privileges in such manner as they may from time to time direct," said:

> "The power to tax merchants in such manner as they may think proper, is expressly given in Section 28, and they have 'directed' that the 'manner' shall be to settle the amount to be paid by the extent of their business, or the quantity of goods, wares and merchandise sold in each year, including things made or produced in this state. Is this prohibited by Section 30? We think not. This is not a tax upon the article, but the occupation of the merchant. There would have been no question if the old mode of taxing the occupation of the merchant a gross sum had been continued. But what difference can it make? The charge is only as to the 'manner' of settling the amount to be paid for the privilege. *It is not the article which is taxed, but the occupation or privilege.*"

In Kurth vs. State, 86 Tenn., 134, decided in 1887, it was held that even a manufacturer of liquors from the produce of the state can not sell without taking out license as a dealer.

The same principle is recognized by the Supreme Court of Tennessee in the case of Machine Co. vs. Gage, 9 Baxter, 518, which was brought to this court by writ of error to the Supreme Court of Tennessee and was affirmed.

Machine Co. vs. Gage, 100 *U. S.*, 676.

We will not further burden this Court with a discussion of the peculiar revenue laws of Tennessee but deem it proper to call the attention of the Court to the fact that in the Supreme Court of the State of Tennessee it was conceded for plaintiff in error that it could not claim any discrimination in the tax laws of the state in respect to the origin of its goods, if it was treated as a merchant because there is no discrimination between merchants in respect to the origin of goods. They are all taxed alike whether the goods representing the "average capital invested" be products of Tennessee or of other states, but the contention is now made by plaintiff in error that the tax laws of Tennessee under consideration operate to discriminate between the plaintiff in error, a citizen of New Jersey, because the goods of plaintiff in error were manufactured in states other than Tennessee. On this question, the Supreme Court of Tennessee, by Mr. Justice Neil, said in part:

> "Complainant concedes that such contention can be raised only against a direct tax, and there is no such tax involved in this case. The tax assessed must stand or fall as a merchant's tax. Hence the question of a discriminative tax which is not raised in this case need not be considered. The tax which is under consideration in the present case has no element of discrimination against the complainant as a foreign dealer or otherwise, and hence can not be objected to on that ground."

We repeat, that the construction of these revenue acts of Tennessee by the Supreme Court of that state is binding upon this

Court, and moreover by the well settled principles announced and enforced by this Court, said acts are in no sense discriminatory against plaintiff in error as a foreign dealer or its goods as articles manufactured in another state.

New York State vs. Roberts, 171 *U. S.*, 658-666.
Bell Gap R. R. Co. vs. Pa., 134, *U. S.*, 232.

THIRD.

The tax assessed against plaintiff in error as a merchant is not in violation of article I, Sec. 8, sub-Sec. 3, of the Constitution of the United States, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and among the Indian tribes."

This is the only question open for consideration upon this record, if, indeed, the facts as found by the Supreme Court of Tennessee show that any federal question can be raised.

The contention made by plaintiff in error that it is protected from taxation on its business in Tennessee by the commerce clause of the federal constitution is based upon the following propositions:

1. Because the goods of plaintiff in error were imported into Tennessee in the original packages of commerce and there offered for sale in the original packages.

2nd assignment of error, brief p. 34.

2. That the goods of plaintiff in error from the time they were shipped from the factory until delivered to the purchaser, were *in transitu* and so can not be considered in an assessment of taxes.

3rd assignment of error, brief p. 40.

We shall consider these propositions in their inverse, but logical, order:

(a.) Were the goods of plaintiff in error in course of transit from one State to another or from the initial point of shipment to the purchaser at the time the tax was assessed?

In answer to this question the Supreme Court of Tennessee, in part, said:

> "We do not think that this position is well taken. Under the method of business pursued by complainant, these goods had been sold to no one, nor were they in course of transit for the purpose of being put directly upon the market. The warehouse of the Patterson Transfer Company was in the nature of a permanent place of deposit where complainant's goods were gathered together, and were left to await the orders of customers, and from the mass so created goods were from time to time drawn to meet the wants of customers, and as called for by them. It is true that an effort was generally made to get agreements from intending purchasers that they would take the output of complainant's mill before the goods were manufactured, and that usually enough of these contracts were in existence, and calling for a sufficient quantity of goods to cover the expected output of sixty or ninety days, the time during which these contracts usually ran; *but these contracts did not constitute sales.*"
>
> *Record pp.* 171-172.

Then the Supreme Court of Tennessee demonstrates that the so-called "contracts" or "orders" which plaintiff in error had taken from its many customers, and which were afterwards filled by delivery from the warehouse in Memphis, did not constitute sales, and there was in fact no sale until the customer had selected the goods desired by him and filed with plaintiff in error or its

warehouse in Memphis a *specification* describing the particular goods desired.

Further, the Supreme Court of Tennessee found as a fact that the goods were consigned to itself at Memphis and there insured by it in the warehouses wherein the goods were stored in an unmarked mass from which when its customers in Arkansas, Texas and other states in the southwest filed their specifications for the particular goods desired by them, goods of the kind and in the quantity specified were taken and shipped, and that this course was also pursued with respect to some of its customers in Memphis; but many of its recognized customers among the merchants of Memphis without the formality of any previous written "order" or "contract" were allowed to select or specify goods whenever they desired, and the Patterson Transfer Company would thereupon promptly deliver to such merchants the goods specified and without any previous notification to the office of plaintiff in error in Chicago or negotiations therewith: Further that the "goods kept on hand at Memphis, in the stock referred to, must be regarded as kept on hand for those purposes also."

Record p. 173.

Further, "it is important at this juncture to note, as shown in the statement of facts, that the fact last stated, is not the only evidence that the goods were not massed at Memphis merely for the purpose of meeting the general contracts above referred to, previously made in and throughout the Southwest; on the contrary as previously stated, it appears that complainant takes advantage of the stages of the water in the rivers over which it ships its goods in barges to float down large quantities of its goods, *in anticipation of sales* and to have them ready, against a time when the waters may be so low that shipments can not be made by that way, but only by the more expensive method of railroad transportation."

Record p. 173.

Upon these facts it is manifest that the goods were not in transit, but were at rest for sale in warehouses provided therefor

and where they might remain for a month or a year or even five years and until they were in fact sold to some customer of plaintiff in error, or until plaintiff in error desired to remove them elsewhere.

In support of the contention made by plaintiff in error that these goods when taxed were in course of commercial transit from the initial point of shipment to the point where the goods are delivered to a vendee and title passes out of plaintiff in error into the vendee, two New Jersey cases are cited.

State vs. Carrigan, 10 *Vroom*, 35.
State vs. Engel, 5 *Vroom*, 425.

On the brief of plaintiff in error it is stated that the last case is even stronger than the first.

For the purposes of this argument we accept what the New Jersey Court of Appeals in the *Engel* case laid down as the law: "The power of the state to tax the subjects of commerce where the transit, for the purposes of commerce, has ceased, and they have become incorporated and mixed with the mass of property in the community is well settled."

Applying this principle to the facts found by the Supreme Court of Tennessee it is manifest that the plaintiff in error was lawfully assessed upon the goods which it had shipped from its factory to itself in Memphis, where said goods were insured for its own benefit, and stored in warehouses for the purposes of sale and deliveries thereafter to be made.

In support of our contention we cite your honors to the following additional authorities.

Coe vs. Errol, 116 *U. S.*, 517.
Brown vs. Houston, 114 *U. S.*, 622.
Kelley vs. Rhodes, 39 *L. R. A.*, 594.

Having thus shown that plaintiff in error was not entitled to escape taxation by reason of its contention that its goods were

taxed when "in transit" from one state to another, we will next proceed to examine into its claim that the assessment against it was an unlawful interference with its rights under the commerce clause of the federal constitution, because it is claimed:

(b.) Its goods were imported into Tennessee in original packages of commerce and there offered for sale in the original packages.

Involved in this is squarely presented the contention that plaintiff in error which has paid no tax whatever upon its goods shipped to and stored in Memphis (Record p. 83) is not liable for taxation as a merchant upon the "average capital invested" in its business carried on by means of these goods, because said goods when sold and delivered from the warehouses, wherein they are stored, to the customers of plaintiff in error were the same packages as when shipped from the factory.

If this proposition can be maintained, then every wholesale merchant in Tennessee buying from a manufacturer or merchant in another state can escape taxation by simply continuing the goods purchased by him in their original packages and in such form sell and deliver said original packages to his customers.

Such is the legitimate and logical result of the proposition contended for by the learned counsel of plaintiff in error, who, with great ingenuity, argues that an original package of commerce is not a subject of taxation in the state to which it is shipped, sold and delivered, so long as it is the property of the shipper or person to whom it is consigned; in this case the shipper and the consignee are the same.

We respectfully submit that there has never been a decision of this court in the slightest degree tending to establish the proposition that goods shipped from one state into another and there put at rest in the latter state and made a constituent of the mass of property in the state in precisely the same manner as other property which is brought into a state for sale and lodged or stored in a warehouse, is not a proper subject for taxation so long as it

remains in the same package in which it was brought into the state and stored or lodged in the warehouse.

But in support of the contention made by plaintiff in error the following cases are relied on:

Brown vs. Maryland, 12 *Wheaton*, 436.
Leisy vs. Hardin, 135 *U. S.*, 100.
Lyng vs. Michigan, 135 *U. S.*, 161.

It is unnecessary to call the attention of this Court to the fact that in *Brown vs. Maryland, supra*, so often relied upon in every attempt to evade just and proper taxation and a due share of the burden which should be borne in consideration of the protection and safety afforded by the state to property within its borders, the principle question before this court for determination was not involved and not directly passed upon by the learned Chief Justice although the doctrine was expressly recognized that when an importer has so acted upon the articles imported that they become mixed up with the mass of the property of the state they lose their distinctive character, and become proper subjects of state taxation.

Leisy vs. Hardin, supra, is not an authority against the contention on behalf of Tennessee in this case, nor, is it difficult to understand the principles upon which that case was determined.

This court at its October term, 1890, *In Re Rahner*, 140 U. S., 545-559, by Mr. Chief Justice Fuller, said:

> "The laws of Iowa under consideration in *Bowman vs. Railway Company*, 125 U. S., 465, and *Leisy vs. Hardin*, 135 U. S., 100, were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country and this, they amounted in effect to a regulation of such commerce."

Further, as stated by this court in *Plumlee vs. Massachusetts*, speaking through Mr. Justice Harlan, *Leisy vs. Hardin* must be restrained in its application to the case actually presented for determination.

155 *U. S.*, 474.

And we submit that there is a wide difference between inhibiting the reception of legitimate articles of commerce imported from one state into the borders of another state, or their sale upon arrival there in the form in which they were imported, and subjecting them to a non-discriminating tax after they are put at rest and mingled with the mass of property within the state.

Lyng vs. Michigan, supra, following the case of *Leisy vs. Hardin*, in which the opinion was also given by Mr. Chief Justice Fuller, involved a discriminating tax against the manufacturer of malt or brewed liquors made outside of the state of Michigan, and therefore was a tax on the occupation or business of selling brewed or malt liquors manufactured outside of the state of Michigan largely in excess of the tax upon the manufacturer of brewed or malt liquors in the state. The tax against the former being $300.00 per annum and against the latter $65.00 per annum.

There can be no question but that such a tax was a burden upon interstate commerce and amounted to a regulation of it, but upon the facts of that case we submit that the opinion of this court rendered therein amounted to no more than an affirmance of the principle that having the right under the commerce clause of the Federal Constitution to ship goods from another State into Michigan, the manufacturer or shipper had the right to sell his goods without the imposition thereon of any other or different burden than the ordinary burden of taxation upon like goods manufactured within the state.

Therefore we submit that *Leisy's* case was one of prohibition and *Lyng's* case one involving solely a discriminating tax; and that neither has any bearing upon a non-discriminating tax laid upon merchants whether foreign or domestic and measured by the

"average capital invested" in the business of such merchants to be ascertained in the manner provided in the Tennessee statute.

Ficklen vs. Shelby County, 145 *U. S.*, 21.

In order to avoid the force of the reasoning and effect of the application of the principles laid down by this court in the cases cited by the Supreme Court of Tennessee in support of its holdings, the eloquent counsel of plaintiff in error is forced to the contention that the rule laid down in *Woodruff vs. Parham*, 8th Wallace, 123, *Henson vs. Lott*, id. 148, *Brown vs. Houston*, 114 U. S., 622, and the other cases cited by the Supreme Court of Tennessee are no longer tenable and offers as cogent reason for such contention that the "country now extends from Alaska to the Philippines and from ocean to ocean, embracing all altitudes and latitudes, and all varieties of climate, soil and productions," on account of which the principles laid down in these well considered cases decided before we had acquired the Philippines and embraced all "altitudes" have become exceedingly old fashioned, obsolete and not applicable to the new order of things. But we submit that the reasons given by this court in announcing its conclusion in the cases above mentioned apply with increased force and vigor to the particular facts presented by this record for consideration by this court.

Upon principle this case can not be differentiated from the leading case of *Woodruff vs. Parham*, 8 Wallace, 123, where in the course of his opinion Mr. Justice Miller, said:

> "Whether we then look to the provision of the clause of the constitution in question or to its relations to other parts of that instrument, or to its office and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit by this clause the right of one state to tax articles brought into it from another.
>
> "If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the constitution as thus construed:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original package may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the state nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all of its citizens.

"These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown vs. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

The learned justice after reviewing all the cases upon which it was contended that the tax in question was violative of the commerce clause of the constitution said:

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales are made by citizens of Alabama or of another state, and whether the goods are the products of that state or some other."

The question, since the decision in Woodruff vs. Parham, has not been regarded as an open one in this court.

In the case at bar, the property of the plaintiff in error was assembled in warehouses where the same was assorted and exposed for sale to such of the customers of plaintiff in error as might send their specifications or orders to said warehouses in

charge of the agents of plaintiff in error, and from which deliveries were made not only to the customers of plaintiff in error residing in other states but also to its customers residing in the city of Memphis, who were accustomed to purchase and have the goods delivered from said warehouse upon the mere application therefor and specifications thereof, without the formality of previous orders or negotiations, and that these deliveries to Memphis merchants were usually made, and were made, on the same day when specifications were filed at the warehouse, provided the goods desired were then in stock in the warehouses.

The revenue statutes of Tennessee under which plaintiff in error was back assessed upon the "average capital invested" by it in its business at Memphis was designed to require defendant and others in like situation with it, without discrimination, to contribute to the revenue of the state, a tax measured by the average amount of capital employed in said business, and is the same, uniform and non-discriminating tax laid upon domestic corporations, individuals and firms engaged in the same business.

By whatever form or name plaintiff in error sought to cover up its business and evade the equal and just tax laws of Tennessee, the fact still remains that it was engaged in the business of a merchant in the city of Memphis.

State ex rel vs. Roberts, 152 *N. Y.*, 59-64.

In *Brown vs. Houston*, 114 U. S., 622, Mr. Justice Bradley said:

> "When the assessor of taxes goes his rounds must he omit from his list of taxables all goods that have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation, and how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other

parts, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital, provided always, that the assessment be a general one, and made without discriminating between the goods, the product of New York, and the goods the product of other states?"

In the subsequent case of *Pittsburg Southern Coal Co. vs. Bates, Sheriff*, 156 U. S., 539, the opinion of the court was delivered by Mr. Justice Field. That case was upon a writ of error to the Supreme Court of Louisiana, to review a judgment of that court, affirming the judgment of the 17th Judicial District Court of the Parish of East Baton Rouge, Louisiana. Mr. Justice Field concluded as follows:

"The decision of the court in Brown vs. Houston, 114 U. S., 622, thus rendered, seems to be conclusive of the case now before the court. The property in this case as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States, in boats and barges, to Louisiana, for the purpose of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject, when it becomes incorporated into the bulk of the property of the county unless there is some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

Mr. Judson in his work on taxation, states the rule that, what constitutes doing business in the state by foreign corporations, is, that a corporation must have a business domicil of some sort in the state, a sales agency, manufacturing plant, *distribution warehouse*, or an interest in a domestic partnership. It must, in some way, establish a place of business within the state for doing some part of its corporate business.

Judson on Taxation, Sec. 181.

This record discloses that, the plaintiff in error found it desirable to establish, as a distributing point, the city of Memphis, and that in that city it lodged in warehouses its manufactured products until they are appropriated to its contracts of sale. Consequently its property is not only mingled with the great mass of the property in the State of Tennessee, but it is in the city of Memphis, at rest, until it is disposed of by selling it. It is not sold when it reaches Memphis, nor when it is put at rest in the warehouse, but afterwards, when each separate part of it is made by use applicable to a specific contract.

Record p. 173.

In *Emert vs. Missouri*, 156 U. S., 318-319, this court speaking through Mr. Justice Gray quoted with approval the following from the opinion in the case of Robbins vs. Shelby County taxing district:

> "As soon as the goods are in the state and become a part of its general mass of property they will become liable to pay tax in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown vs. Houston, 114 U. S., 622. When goods are sent from one state to another for sale, or in consequence of a sale, they become a part of its general property and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. Brown vs. Houston, supra, Machine Co. vs. Gage, 100 U. S., 676. But to tax the sale of such goods or the offer to sell them before they are brought into the state is a very different thing and seems to us clearly a tax on interstate commerce itself. The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

Emert vs. Missouri, 156 *U. S.*, 319.

Applying these principles to the facts of this case it is not difficult to demonstrate that the tax assessed against plaintiff in error was not an effort to impose a tax either upon the sale of such goods or the effort to sell them before they were brought into the state of Tennessee, nor a tax upon the negotiations of and sales of such goods when they were in another state, because said goods were in fact not sold to any one until after they were brought into the state of Tennessee, and there stored in warehouses in precisely the same condition as other goods were stored by wholesale dealers in merchandise, but were sales and deliveries to customers upon specifications for goods without which, as demonstrated by the supreme court, no sales were or could have been made and the goods so situated in said warehouses were in fact and legal contemplation mingled with the general mass of property in the state of Tennessee, requiring the protection of the laws of the state and amenable to its just and proper burdens.

After a full statement and review of all the facts of the case, and in a manner more favorable to plaintiff in error than we thought it was entitled to upon the testimony, the Supreme Court of Tennessee in response to the contention that plaintiff in error was not liable to taxation of its goods because they were sold in the original packages, said:

> "We do not deem this a sound view, because the facts above stated show that complainant's goods were put up for sale in Memphis, and were so dealt with as to make them a part of the common mass of property in the state."
>
> *Record p.* 174.

We have referred to the opinion of Judge Hammond in *Oliver Finney Grocery Co. vs. Speed, Clerk*, 87 Fed. Rep., p. 408, to sustain our contention that the tax in question was not discriminatory against plaintiff in error, and before concluding our argument upon the particular phase of the question now being considered—the original package doctrine—we deem it proper to again call the attention of the court to Judge Hammond's well considered

opinion wherein with great powers of analysis the learned judge demonstrates that there is no conflict between the cases relied upon by plaintiff in error and the principle cases cited to support the judgment of the Supreme Court of Tennessee. The learned judge, beginning on page 413, says:

"The argument made in the brief of counsel assumes that the case of Woodruff vs. Parham, 8 Wall., 123, has been overruled by the case of *Leisy vs. Hardin*, 135 U. S., 100. This latter case was not one involving the question of taxation at all, and, even in its relation to the exercise of the police power of a state over articles of interstate commerce, it has been said in the subsequent case of *Plumley vs. Massachusetts*, 155 U. S., 461, 474, that the case must be restrained in its application to the case actually presented for determination; and it is very doubtful if it may be used, as is sought to be done in this case, to maintain the broad position that all articles of imported goods, while remaining in the original packages, are exempt from taxation, direct or indirect, for that is what this bill means in its contentions. It is still more doubtful if that principle can be held to have been established by that case in the light of the subsequent cases of Emert vs. Missouri, 156 U. S., 296, Coal Co. vs. Bates, 156 U. S., 577, and Coal Co. vs. Louisiana, 156 U. S., 590, in which the case of Leisy vs. Hardin, supra, *Woodruff vs. Parham, supra, Brown vs. Houston*, 114 U. S., 622, *Brown vs. Maryland*, 12 Wheat., 419, and many of the other cases relied upon by plaintiff's counsel in this case, are cited by the court; and there is no intimation that the case of *Woodruff vs. Parham*, supra, is regarded by that court as having been overruled. In *Emert vs. Missouri*, supra, it was distinctly held that a statute of a state by which peddlers were required, under a penalty, to take out and pay for licenses making no discrimination between residents or products of the taxing state and those of other states, is not repugnant to the constitution of the United States. And in *Coal Co.*

vs. Bates, supra, it was held that a tax upon coal in the original barges, in which it was shipped from one state to another, was subject to local taxation in the state where it was found; and in neither of these last cited cases was there any dissent among the judges who so widely differed in *Leisy vs. Hardin,* supra, and Plumley vs. Massachusetts, supra, showing that it was not considered by the court that Leisy vs. Hardin applied to the cases of taxation of imported goods held in the original packages unsold. In the cases involving the power of taxation, the determination of the question of legality or illegality as affected by the interstate commerce clause of the federal constitution seems to depend largely upon the question of unjust discrimination between the products of the taxing state and the products of other states introduced by importation; and it is conceded by the brief of counsel in this case that no such discrimination has been made by the acts of the Tennessee legislature we have now under considertaion. It is not necessary, in my judgment, to give any technical attention to any of these decisions, for the reason that it appears upon the face of the bill and the acts of the legislature that the taxes assessed and levied are not assessed and levied upon the imported goods directly, indirectly or remotely in any legal sense, but are *'a valid exercise of the power of the state over persons and business within its borders,'* to use the concluding language of Mr. Justice Gray in the case of *Emert vs. Missouri,* supra."

In the case of May vs. New Orleans, 178 U. S., 496, we respectfully submit the plaintiff in error can find no support of its contention, while on the contrary that case when analyzed supports and recognizes the distinction between the cases relied upon by plaintiff in error and those supporting the judgment of the Supreme Court of Tennessee.

In that case among other things Mr. Justice Harlan, said:

"That a state can not, in the form of a license or otherwise tax the right of the importer to sell, but when

> the importer has so acted upon the goods imported that they have become incorporated or mixed with the general mass of property in the state, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the state in like condition with other property that should contribute in the way of taxation to the support of the government which protects the owner in his person and estate."

Therefore we respectfully insist that as this court can not enter into an original inquiry in respect to the facts, the Supreme Court of Tennessee has found such a state of facts as conclusively shows that plaintiff in error has so acted upon and intended to so act upon its manufactured products by bringing them into the state and putting them at rest in Memphis for the purposes of sale that the case is not only within the rule of *Woodruff vs. Parham, Lott vs. Henson, Brown vs. Houston,* and *Pittsburg Coal Co. vs. Bates,* supra, but within the reasoning of the rule laid down in *Brown vs. Maryland,* supra.

It is no answer to the cases of *Brown vs. Houston* and *Pittsburg Coal Co. vs. Bates,* to insist that the barges in which the coal taxed in these cases were brought to Louisiana constituted original packages.

We might with equal reason claim that the barges in which the kegs of nails and coils of wire were brought to Tennessee were the original packages.

But in the view we take of the question, which we submit is sound both upon reason and authority, it is wholly immaterial whether the barges and lumps of coal or the coils of wire rope constituted the original packages.

The principle underlying the question is not whether the barges in which plaintiff in error brought its goods or the kegs of nails and coils of wire were the original packages, but whether said

packages, that is the kegs of nails and coils of wire had been so used and dealt with as to make them a part of the common mass of property in the state, and on the holding of the Supreme Court of Tennessee on this question, based upon the overwhelming facts as found by it, we submit that plaintiff in error was properly assessed for taxation as a merchant upon the "average capital invested" in its business in Tennessee.

In conclusion we invite the attention of your Honors to the fact that there is and can be no complaint made by plaintiff in error that it has been subjected to an unfair or excessive assessment; that upon and under the holding of the Supreme Court of Tennessee it is only sought to lay upon plaintiff in error the same tax that is assessed against other merchants; that it is in no way discriminated against either as a foreign corporation or a merchant dealing in articles manufactured of the produce of another state; but that for more than two years prior to the assessment of the tax in question it had been engaged in business in the State of Tennessee and had had invested in said business several hundred thousand dollars worth of property which had received the protection of the laws of Tennessee, and that therefore being so engaged in business and having its capital thus invested in business within and under the protection of the laws of Tennessee the assessment of a tax against plaintiff in error as a merchant was a "valid exercise of the power of the state over persons and business within its borders," and in so holding there is no error in the judgment of the Supreme Court of Tennessee and the same should be affirmed.

Respectfully submitted,

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